

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.318 of 1993

(Against the judgment of conviction and the order of sentence, dated, 24th June, 1993, passed, by Shri Chakradhar Rai, 1st Additional Sessions Judge, Samastipur, in Sessions Trial No.237 of 1986/20 of 1988, arising out of Hasanpur P.S. Case No. 160 of 1985)

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Hemant Rai @ Hemant Kumar Rai son of late Ganga Prasad Rai
resident of village Geetadebwaha P.S. Hasanpur, District
Samastipur

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Ajay Kumar Thakur, , Advocate
Mr. Md. Imteyaz Ahmad, , Advocate
Mr. Nilesh Kumar, Advocate
For the Respondent : Mr. Ajay Mishra, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI
And
HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)

Date: 13-07-2015

Under the judgment, dated 24.06.1993, passed, in Sessions Trial No.237 of 1986/20 of 1988, by learned 1st Additional Sessions Judge, Samastipur, the accused-appellant, Hemant Rai @ Hemant Kumar Rai, stands convicted under Sections 302, 341 and 326 of the Indian Penal Code and Section 27 of the Arms Act, 1959. In consequence of his conviction, the accused-appellant, Hemant Rai @ Hemant Kumar Rai, stands, under the order, dated 24.06.1993, sentenced to suffer

imprisonment for life under Section 302 of the Indian Penal Code, ten years under Section 326 of the Indian Penal Code, one month under Section 341 of the Indian Penal Code and seven years under Section 27 of the Arms Act, 1959. However, all the sentences have been directed to run concurrently.

2. The case of the prosecution, as unfolded by the First Information Report, may, in brief, be described as under:

(i) On 08.12.1985, at about 6.00 A.M., when Arun Rai (since deceased) was, in presence of his co-villager, Kari Rai, washing his mouth in front of the door of his co-villager, Anirudh Mishra (PW 2), accused Hemant Rai came there and fired from his country-made pistol. The bullet, so fired, hit Arun Rai's head, which started bleeding and he fell down.

(ii) On witnessing the occurrence, Anirudh Mishra (PW 2), raised *hulla*, whereupon their other co-villagers, including Arvind Rai (PW 1), came. The relatives and co-villagers of injured Arun Rai brought him to the house of Baijnath Babu and from there, while they were taking Arun Rai in a jeep and reached near a place called Godown Chowk, accused Hemant Rai and accused Dayanand Rai (since deceased), accompanied by 3-4 unknown persons, stopped the jeep by blocking the road with the help of a bullock cart, accused Hemant Rai came behind the jeep and fired at Arun Rai on his abdomen. The second bullet, fired by accused Hemant Rai, hit the hand of Chandra Kant Jha

(PW 4).

(iii) When the two injured were undergoing treatment at Sub-Divisional Hospital, Rosera, the police was informed by the doctor of Sub-Divisional Hospital, Rosera, but before the police arrived, the doctor (PW 10) had examined the two injured and, having provided *first-aid* to Arun Rai and Chandra Kant Jha, referred them to the Sadar Hospital, Samastipur, or Darbhanga Medical College Hospital.

(iv) Before, however, injured Arun Rai left Rosera Hospital, injured Arun's statement was recorded by Mahesh Prasad Singh, Sub-Inspector of Police, Rosera Police Station (PW8), in the form of *fardbeyan*, and treating the said *fardbeyan* of Arun Rai as First Information Report, Hasanpur Police Station Case No. 160 of 1985 came to be registered, under Sections 341/307/324 of the Indian Penal Code and Sections 25 A/27 of the Arms Act, 1959, against two accused Hemant Rai and Dayanand Rai and 3-4 unknown persons. On the way to Samastipur Hospital, injured Arun Rai succumbed to his injuries. His dead body was carried to Samastipur, where inquest was held over the said dead body, which was also subjected to *post mortem* examination. As Arun Rai succumbed to his injuries, Section 302 of the Indian Penal Code was added to the case aforementioned.

(v) So far as Chandra Kant Jha (PW 4) was

concerned, he was taken to Darbhanga Medical College Hospital, where he was treated.

(vi) On completion of investigation, a *charge sheet* was laid, under Section 302/34 of the Indian Penal Code and also under Section 27 of the Arms Act, 1959, against accused Hemant Rai and accused Dayanand Rai.

3. At the trial, charges, under Sections 302, 326 and 341 read with Section 34 of the Indian Penal Code and Section 27 of the Arms Act, 1959, were framed against both the accused aforementioned. To the charges so framed, the two accused aforementioned pleaded not guilty.

4. During the pendency of the trial, accused Dayanand Rai died and the trial proceeded against accused-appellant, Hemant Rai.

5. In support of their case, prosecution examined altogether 13 (thirteen) witnesses. The accused was, then, examined under Section 313 (1) (b) of the Code of Criminal Procedure, wherein the accused denied that he had committed the offences, which were alleged to have been committed by him, the case of the defence being that of denial. No evidence was adduced by the defence.

6. Having, however, found accused Hemant Rai guilty of the offences, which he stood charged with, learned trial Court convicted him accordingly and passed sentences against

him as mentioned above.

7. Aggrieved by his conviction and the sentences, which have been passed against him, the accused, as a convict, has preferred this appeal.

8. We have heard Mr. Ajay Kumar Thakur, learned counsel, appearing for the appellant, and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing on behalf of the State.

9. While considering the present appeal, it may be noted, at the very outset, that according to the evidence of Dr. Krishna Chandra Singh (PW7), who had, on 09.12.1985, admittedly, conducted *post mortem* examination on the dead body of Arun Rai, he found as follows:

"(1) Lacerated punctured wound oval in shape $\frac{3}{4}$ " x $\frac{1}{6}$ " x abdominal cavity deep over the right side of front of the abdomen on the lumber region with inverted edge.

(II) Lacerated punctured wound oval in shape $\frac{3}{4}$ " x $\frac{1}{2}$ " x abdominal cavity deep on the right side of the back $1\frac{1}{2}$ " from the midline at the level of the second lumber vertebra inverted margins.

(III) Lacerated wound 4" x $\frac{3}{4}$ " x scalp deep over the left side of the scalp on the parietal bone. There was fracture of the left parietal bone underneath 2" long.

On deep dissection of the abdomen, the right kidney was found lacerated. There were through and through perforations of the small and large intestine at one place each on the each bowel. The abdominal cavity contained about 500 ml. of blood.

Injury Nos. I and II above were found to be continuous. Injury No.1 was the

wound of entry and injury No. II was the wound of exit.

On deep dissection of the scalp after removal of the vault plenty of subdural blood clots were found over the brain substance on the left parietal region. There was laceration of the brain tissue superficially underneath.

Injury Nos.1 and II were caused by a projectile fire arm. Injury No.III was caused by some hard substance”.

10. It is in the evidence of the doctor (PW 7) that Arun Rai's death had been caused due to shock and haemorrhage as a result of the *ante mortem* injuries noted above, which, in the ordinary course of nature, are sufficient to cause death, time having elapsed since death being within 24 to 36 hours.

11. Neither the findings of the doctor nor his opinion, with regard to cause of death of the said deceased and/or his opinion with regard to the nature of weapon, which might have been used, for causing assault on, and death of, the said deceased, were disputed either by the prosecution or by the defence. This apart, we, too, do not notice anything inherently incorrect or improbable in the evidence given by the doctor (PW 7).

12. The question, however, remains: whether the accused-appellant, Hemant Rai, was the one, who had caused the death of Arun Rai and thereby committed the offence of *murder* punishable under Section 302 of the Indian Penal Code?



13. While considering the first information report, which has been treated as dying declaration of Arun Rai, it may be noted that there were two witnesses to the said dying declaration, namely, Anirudh Mishra (PW 2) and Kari Rai. While Anirudh Mishra has been examined as PW 2, Kari Rai has not been examined, though, according to the *dying declaration*, Arun Rai was shot at his head in front of the door of Anirudh Mishra, when Anirudh Mishra and Kari Rai were present there. Why Kari Rai was not examined as a witness has not been explained by the prosecution. Consequently, Anirudh Mishra (PW 2) remains the sole eye-witness.

14. What may, now, be pointed out is that according to Mahesh Prasad Singh (PW 8), Arun Rai's statement, as *fardbayan*, was recorded by him at the Sub-Divisional Hospital, Rosera, on 08.11.1985 at about 10.30 A.M. On the basis of the said *fardbayan*, a first information report was formally drawn on 08.11.1985. However, the First Information Report reached the jurisdictional Judicial Magistrate as late as on 11.12.1985. Neither any explanation has been offered by the prosecution for their omission to send the First Information Report forthwith to the Magistrate concerned nor is, in this regard, any explanation discernible from the materials on record. This apart, the Investigating Officer (PW 11) having not turned up for his cross-examination, the defence was clearly denied the opportunity to

enquire from the Investigating Officer (PW 11) as to why the first information report had reached so belatedly.

15. Situated thus, we find considerable force in the submissions made on behalf of the appellant that the First Information Report was drawn after due deliberation. At any rate, the possibility of the First Information Report having been drawn after due deliberation cannot be boldly ruled out; more so, when we find that out of the two witnesses to the said *fardbeyan*, only Chandra Kant Jha (PW 4) has been examined and his evidence, as we would show, does not inspire confidence.

16. It is significant to note that Anirudh Mishra (PW 2) has deposed that he reached the hospital with the injured at 10.30 A.M., where Arun Rai was treated and his treatment started after 15-20 minutes of his arrival at hospital and Arun Rai was treated till 11.30 A.M. It is also in the evidence of PW 2 that after one-and-a-half-hour of his arrival at the hospital, the police reached there meaning thereby that the police arrived between 11.30 A.M. and 11.45 A.M. Interestingly enough, this witness could not even say as to how much time was consumed in recording the *fardbeyan* of Arun Rai.

17. What is, however, of great significance to note, in the evidence of PW 2 is that according to him, Arun Rai's statement was recorded by the police in *question-answer form*;



whereas the *fardbeyan* (Exhibit 3) is found to be the statement of Arun Rai, which is not in the *question-answer form* and, as rightly pointed out by the learned counsel for the appellant, the said *fardbeyan* has been written on two pages. This apart, the said *fardbeyan* is shown to have been recorded at 10.30 A.M.; whereas the evidence of PW 2 shows that the *fardbeyan* was recorded between 11.30 A.M. and 11.45 A.M.

18. While considering the above aspect of the prosecution's case, it is imperative to note that Chandra Kant Jha (PW 4) lodged a *fardbeyan* at Darbhanga Medical College and Hospital, where he had been admitted, and in the said *fardbeyan*, PW 4 stated that 3-4 unknown criminals, armed with country-made pistols had come to the jeep, where he could not recognize inasmuch as they were outsiders. It is also of immense importance to note that when the Investigating Officer told PW 4 that the people were naming Hemant and Dayanand as assailants, PW 2 wondered as to why people were naming Hemant Rai and Dayanand Rai. Though the said previous statement was put to PW 4 as the statement made by him during investigation of the case, PW 4 denied the same, the Investigating Officer having not been examined, the said contradiction could not be put by the defence. To this extent, therefore, the defence clearly suffered serious prejudice.

19. The evidence of Dr. Chandra Shekhar Prasad



(PW 10) shows that he examined Arun Rai on 08.12.1985 at 10.00 A.M. and referred him to Sadar Hospital, Samastipur, or Darbhanga Medical College Hospital and, on the same day, he examined Chandra Kant Jha (PW 4) and referred him also to Samastipur Hospital or Darbhanga Medical College Hospital by requisition slips, which have been proved as Exhibit 6 and Exhibit 6/1 respectively. These exhibits go to show that Arun Rai (since deceased) and Chandra Kant Jha (PW 4) were examined at 10.00 A.M. and referred to Samastipur Hospital or Darbhanga Medical College Hospital. The assertions of the prosecution witnesses that Arun Rai's *fardbeyan* was recorded between 11.30 and 11.45 A.M. cannot be really believed.

20. It is in the evidence of Mahesh Prasad Singh (PW 8) that it was on the basis of the OD slip, issued by the doctor in the aforesaid hospital, that he came to the hospital and recorded there the *fardbeyan* of Arun Rai. It is also in the evidence of PW 8 that OD slip was pasted with the station diary, but neither the station diary entry nor OD slip was produced by the prosecution at the trial.

21. Coupled with the above, though PW 8 claims to have recorded Arun Rai's *fardbeyan* and claims that when he so recorded the *fardbeyan*, apart from the doctor (PW 10), two nurses were also present, none of the two nurses was examined at the trial and the doctor (PW 10) does not mention at all, in his



evidence, that *fardebayan* of Arun Rai was recorded by the police. Further-more, the doctor's finding discloses that Arun Rai's right kidney was found lacerated and there were through and through perforations of the small and large intestine and, on dissection of the skull, after removal of the vault, plenty of subdural blood clot was found over the brain substance on the left parietal region.

22. In such a situation, as indicated above, it is very unsafe to believe, in the absence of the evidence of the doctor (PW 10) supporting the case of the prosecution, that injured Arun Rai could have made any statement and/or that Ext. 3 is the statement of the injured Arun Rai made to the Police Officer (PW 8). This impression gets reinforced when we notice that all the prosecution witnesses have deposed that on receiving second fire-arm injury, Arun Rai became unconscious and there is no evidence on record that having fallen unconscious, Arun Rai regained his sense on the way to Rosera Hospital or on reaching the hospital.

23. Coupled with the above, the doctor (PW 10) has, nowhere, deposed that he had sent OD slip to the police nor he has deposed that any police officer came to the hospital and recorded the statement of the injured; whereas PW 8 claims that he recorded not only the statements of Arun Rai, but that the doctor and two nurses were also present there. No credence can, therefore, be given to the evidence of PW 8 that he (PW 8)

recorded Arun Rai's *fardbayan*, more so, when PW 7 has admitted that with the nature of injuries, which Arun Rai had sustained, a person cannot make any statement fluently.

24. Because of what has been discussed and pointed out above, we find it wholly unsafe to place reliance on the evidence, adduced by the prosecution, that Exhibit 3 is the *fardbayan* of Arun Rai made at the time, when he was lying injured at Sub-Divisional Hospital, Rosera.

25. Moreover, omission to examine Kari Rai, once again, compels us, in the face of the facts of the case, to draw an adverse inference against the prosecution, the inference being that had Kari Rai (charge sheet witness no.3) been examined at the trial, his evidence would not have supported the case of the prosecution and that was the reason why Kari Rai was withheld from the Court.

26. What is significant to note is that according to Anirudh Mishra (PW 2), on the date of occurrence, at 7.00 A.M. when he was at his door, where Arun Rai was washing his mouth, accused Hemant Rai came and shot at Arun Rai and, then, fled away and that having been shot at, Arun fell down. It is in the evidence of PW 2 that he raised *hulla*, whereupon many others came there including Arvind Kumar Rai (PW 1), brother of the deceased, and, then, he put injured Arun Rai on a cot and took him to the house of Baijnath Babu and when they were



taking injured Arun, in the jeep of Baijnath Babu, towards the hospital, accused Hemant Rai and Dayanand Rai (since deceased) accompanied by 3-4 unknown persons, stopped the jeep by blocking the road with the help of a tyre-cart, Hemant Rai came behind the jeep and shot at Arun Rai, which hit him on his abdomen and that Hemant also fired bullet hitting Chandra Kant Jha on his right hand, who was also inside the jeep, and, then, Arun Rai and Chandra Kant Jha were taken to Rosera Hospital.

27. From the above evidence of PW 2, it is clear that only upon *hulla* being raised by PW 2, others came there.

28. Bearing in mind what we have indicated above, when we come to the evidence of PW 1, who is younger brother of the deceased, we notice that, according to him, on hearing the sound of firing, which came from the direction of the house of PW 2, he went there and saw Arun Rai, who had been shot on his head and he saw Hemant Kumar Rai, armed with pistol, fleeing away from there and, then, others came and when they were taking injured Arun Kumar to Rosera Hospital, the road was blocked by placing a tyre-cart on the road and Hemant Rai fired bullet on the abdomen of Arun and also fired another shot, which hit Chandra Kant Jha on his hand.

29. So far as Ramanand Rai (PW 3) is concerned, according to him, he heard the sound of firing from the eastern

direction and he, along with PW 1, came to the door of Anirudh Mishra and saw Arun lying on the ground with his head bleeding. On being asked by them, Arun stated that Hemant Rai had shot at him.

30. Clearly, PW 3 is the sole witness, who has stated that Arun Rai disclosed, at the place of occurrence, as to who had shot at him. The evidence of PW 3 having not been supported by others including PWs. 1 and 2, his solitary assertion that the injured had disclosed as to who had injured him cannot be believed. This apart, the evidence of PW 3 also shows that the claim of PW 1 that he had seen the accused Hemant Rai fleeing away with the fire-arm cannot be true, when even PW 1 had arrived, in the light of the evidence of PW 1, along with PW 3 and others at the place of occurrence. Though PW 1 denied that he had not told the police, during course of investigation, that he had seen Hemant Rai fleeing away with pistol, the Investigating officer having not been brought for cross-examination, this part of the suggestion of the defence remained unproved. Here, again, prejudice caused to the defence is writ large. That the evidence of PW 1 is not safe to believe also becomes clear from the fact that though he was all along present, he admits that he cannot say as to how many times Arun Rai was treated at the hospital. As far as PW 3 is concerned, his evidence cannot be believed at all.



31. What is, however, material to note, while considering the evidence of PW 2, is that though he gave evidence in his cross-examination as if he was eye-witness to the occurrence, his evidence, in the cross-examination, shows that he was inside his house, he came out and raised *hulla* after about one-and-a-half minutes of the alleged occurrence, which took place. Hence, neither PW 2 is an eye-witness nor he or PW 1 could have seen accused Hemant Rai fleeing away.

32. Similarly, according to the evidence of PW 1, no one got down from the jeep nor anyone tried to save Arun Rai, whereas the evidence of Chandra Kant Jha (PW 4) is that he was sitting in front of the seat of the jeep and, on arrival of the accused, he came down from the jeep and tried to save Arun Rai. We notice that the defence gave suggestion to PW 4 that he had not made any statement during investigation before the police but the Investigating Officer having not been produced for his cross-examination, the said suggestion could not be proved. This is yet another instance which caused serious prejudice to the defence.

33. While considering the evidence of injured Chandra Kant Jha, it may also be noted that, according to the defence, the previous statement of this witness, made during course of investigation, was to the effect that those, who had come and fired shot at Arun Rai, when he (Arun Rai) was being

carried in a jeep, were unknown. This omission could not be proved by the defence, because of non-production of the Investigating Officer.

34. Because of what has been discussed and pointed out above, we are clearly of the view that the evidence adduced by the prosecution, was ad-mixture of half-truth and untruth. This apart, the half-truth and untruth are so inextricably mixed with each other that it has become impossible to disengage the truth from falsehood.

35. In the backdrop of what has been discussed and pointed out above, we are firmly of the view that the prosecution had failed, in the present case, to bring home the charges against the accused-appellant beyond reasonable doubt and that the accused-appellant was entitled to be accorded benefit of doubt.

36. Because of what has been discussed and pointed out above, this appeal needs to be allowed.

37. In the result and for the foregoing reasons, we allow this appeal. The impugned conviction of the accused-appellant and the sentences passed against him by the judgment, under appeal, are hereby set aside. The accused-appellant, Hemant Rai @ Hemant Kumar Rai, is held not guilty of the offences, which he stood convicted of, and he is hereby acquitted of the same under benefit of doubt.

38. Since the accused-appellant, Hemant Rai @ Hemant Kumar Rai, is on bail, his bail bonds are hereby cancelled and his sureties shall stand discharged.

39. Registry shall, forthwith, send a copy of this judgment and order to the learned trial Court along with the Lower Court Records.

(I. A. Ansari, J.)

(Vikash Jain, J.)

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